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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 192

WILLIAM E. EVANS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA.

PETITION FOR WRIT OF CETIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

C. Y. Brown,
John F. Williams,
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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

William E. Evans, the petitioner, was tried July 28, and 29, 1942, in the Court of Sessions for Spartanburg County, South Carolina, under an indictment charging him, under Sec. 1112, of the 1942 Code of Laws of South Carolina, with

aiding in producing an abortion. He was found guilty and sentenced to 12 years imprisonment.

The defendant duly appealed to the Supreme Court of South Carolina, which affirmed the judgment and sentence on March 29, 1943. A petition for re-hearing was duly filed (R. 184) and the court (R. 189) on May 11, disposed of the petition by overruling it, as is often done in such cases, without further discussion.

It is this judgment which is now sought to be reviewed.

During the course of the trial the Solicitor offered as a witness against petitioner Sheriff Sam Henry, of Spartanburg, whose testimony was undoubtedly intended to corroborate the testimony of the woman who claimed to have committed the abortion upon the advice of petitioner. The Sheriff having stated that as a result of his investigation he arrested the petitioner and that he and other officers arranged a meeting in jail between him and his codefendant in order to get whatever information he might from them, when he began to detail the conversation between the three, the testimony was objected to on the grounds stated in the record (R. 54). The Solicitor urged the testimony as competent and the presiding judge admitted it as competent, upon the issue of the guilt or innocence of the petitioner. This testimony of the chief law enforcing officer of the County detailed the accusations made by petitioner's codefendant substantially as she had testified during the day (R. 4). However, he went slightly further than she did, in that he testified that petitioner assumed the charge to be true to ask her questions, though he did say on his cross-examination that petitioner denied any guilt. The admission of the testimony is made the basis of Exception 1 to the State Supreme Court (R. 166).

It will be noted, however, that where a person is charged with felony, as petitioner was, the State Supreme Court

itself will consider any error in the admission of testimony that in any manner tends to incriminate the accused, even though it was not objected to by defendant's counsel. And, too, it will be noted that Henrietta Henderson was not the first one to mention the name of petitioner (R. 163), and she had not yet been arrested. When she was arrested and placed in jail, the Sheriff arrested Evans and placed him in jail with the prearranged meeting of the two, in an effort to get evidence against Evans. When Henrietta Henderson was out on bond she went to the office of one of Evans' attorneys, Mr. Galloway, and there, according to the stenographer who took down her statement, voluntarily exonerated Evans. She was rearrested, within four days, and held until the trial, at which time she again accused Evans. It developed in the course of the trial that this was the first crime of this character that Henrietta had ever committed; that it was the first time she had ever seen Evans or the girl; that Evans took the girl to her house, in the country, and left her there without having even spoken to her about it, and that the girl sat there for some two to four hours until Evans returned, and that he came in and introduced himself, and, according to the husband of Henrietta, shook her hand. This being about the state of the direct testimony thus far produced against petitioner, the State rested its case, and defendant put up some witnesses.

It was now 5:55 P. M. The Court had previously announced at the opening, that the hours of adjournment for the day would be 6 P. M. Mr. Brown, of counsel for the petitioner, just five minutes before the previously announced time for adjournment, moved the court to suspend until next morning (R. 85), saying "* * * we made our arrangements to work accordingly * * *". The

following is what took place between counsel and the Court:

> "The Court: Is there nothing else you can do, Gentlemen, between now and seven o'clock? Let the Jury go in the room there. (Jury retires) I am not going to lose this hour if I can help it; if you have anybody else, we will go on. How about the defendant—are you going to put him up?
>
> "Mr. Brown: After the witness we will have, here is what we had in mind. We have eliminated a lot * * *
>
> "The Court: Put the defendant up—you've got an hour for that. Bring the Jury back (Jury returns). Proceed, Gentlemen:
>
> "W. E. Evans, a witness for the defense, duly sworn, testifies as follows:"

This ruling of the Presiding Judge constitutes the basis of Exception 2 to the State Supreme Court (R. 167).

The two questions presented by the Exceptions to the State Supreme Court were, substantially:

(1) Did the Presiding Judge err in admitting the testimony of Sheriff Sam Henry?

(2) Did the Presiding Judge err in ordering the defendant to take the stand, in response to a motion made by defendant's counsel to suspend court five minutes before the time for adjournment, without allowing defendant's counsel to state the grounds of his motion, and without allowing petitioner the benefit of the advice of counsel as to whether he should take the stand at that time, or even at all. And, as the record clearly shows, the Presiding Judge refused to hear counsel state why he had eliminated features of his former plan and decided to work on another arrangement, which arrangement the court refused to allow petitioner's counsel to state, after counsel had announced to the court that he had been working according to that plan. The

Court's attention is respectfully called to the record beginning on page 54, where it is clearly shown that neither the Solicitor nor the Presiding Judge allowed petitioner's counsel to fully state his position against the admission of the testimony of Sheriff Henry. It will be noted that at f. 218, on page 55, the Solicitor interrupted the court to ask a question; and while the record does not show whether the jury had retired at the time or not, yet at f. 214 the record does show that the court interrupted Mr. Brown before he could state his position, to ask the Sheriff if a warrant had been sworn out for the defendant at the time of the three-cornered conversation in the jail. Mr. Brown immediately cited the case of the *State* v. *Hester* (R. 216), and the Solicitor, without waiting for the court to rule, continued asking the Sheriff about the conversation. Mr. Brown again objected (R. 218). At R. 224, notwithtsanding the fact that Mr. Brown had stated to the court that the case of the *State* v. *Hester* held the testimony inadmissible (and the State Supreme Court so held) the Presiding Judge never one time asked to see the case, nor ruled in accordance with its holding. At R. 224, Mr. Brown again started to tell what "We think". The Court abruptly cut him off after the two words "We think" and announced that he was satisfied the testimony was competent and ordered the jury brought back into the court room, and proceeded with the testimony of Sheriff Henry. At R. 229, when Mr. Brown started to announce he was reserving his exception, the Solicitor cut him off with a question to the Sheriff, without letting him complete his statement to the court.

Upon the rendition of the opinion of the Supreme Court, affirming the conviction, petitioner caused to be filed, within due time, a petition for re-hearing (R. 184). In this petition, these issues were specifically brought again to the attention of the State Supreme Court, as was the additional issue that the opinion of the Court would deny petitioner

trial by a jury, if that Court might decide that there was sufficient evidence to convict, after eliminating the objectionable testimony of Sheriff Henry. And specifically, petitioner, after mentioning the fact that Sheriff Henry's testimony must have had some influence upon the jury, asked if that, and forcing the defendant to the stand, constituted due process. Particularly did the petition for rehearing refer again to the argument and the authorities cited in petitioner's printed brief amongst which were the State and Federal constitutional guaranties, that in the trial of criminal cases the defendant shall be fully heard in his defense by himself, or by his counsel, or by both, and shall not be a witness against himself. *Sec. 17, Art. 1, Constitution S. C., Sec. 18, Art. 1, Constitution S. C., Amendments 5 and 6 U. S. Constitution.*

The State Supreme Court did consider these constitutional guaranties in is original opinion; but did not discuss them at any length, going no further than to say that the Presiding Judge's action was indicative of desire to progress with the trial and not of any intention to force the defendant to take the stand, in violation of his constitutional right.

Hence, petitioner, submits that the opinion of the State Supreme Court, not only decides a Federal question of substance in a manner contrary to the adjudications of the Supreme Court of the United States; but that it decided these issues, with respect to the testimony of Sheriff Henry and the order of the Judge to the defendant to take the stand and testify, contrary to the previous holdings of the State Supreme Court, upon the same questions, and particularly in that testimony obtained in such a way has been held by the adjudicated cases to be prejudicial, and to warrant a new trial without regard to consideration of the weight or effect thereof, as we shall show hereinbelow. And, hence, a third question arises, namely: Did the action of the trial

court and the State Supreme Court violate petitioner's due process as guaranteed to him by the 14th Amendment to the United States Constitution and the law of the land, including the decisions of the State Supreme Court and the constitutional and statutory laws of this State, which will be specifically referred to hereinafter.

Petitioner sought the consent of the State Supreme Court twice to make a motion for a new trial on after-discovered evidence, and was both times turned down. Those motions were made upon affidavits setting forth the proposed after-discovered evidence; when both motions were turned down. Those proceedings are not incorporated in this record for the reason that they would throw no light on the issues now involved. Petitioner also made a motion before the State Supreme Court for bail, pending the application for review by the United States Supreme Court. That application was declined for the time being. See order (R. 191).

II.

Jurisdiction.

The basis upon which it is contended by petitioner that this Honorable Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this cause, is Sec. 237-B of the Judicial Code, as amended, U. S. C. A., title 28, Sec. 344-B, for that petitioner, by the said judgment, has been denied due process of law and the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States; in that the Supreme Court of this State has decided Federal questions of substance and State questions vital to the defense of petitioner, and has decided all such questions adversely to the former adjudications of the State Court, and contrary to the conclusions of law announced in the opinions of the Supreme Court of the United States.

III.

Question Presented.

Whether under the undisputed facts and the law applicable thereto, petitioner has been denied due process of law and the equal protection of the laws under said 14th Amendment, by the action of the Supreme Court of South Carolina on appeal from the Sessions Court of Spartanburg County, South Carolina, affirmed by the State Supreme Court, in the following particulars:

(a) Did the Presiding Judge err in admitting the testimony of Sheriff Sam Henry?

(b) Did the Presiding Judge err in ordering the defendant to take the stand in response to a motion made by defendant's counsel to suspend court five minutes before the time for adjournment, without allowing defendant's counsel to state the ground of his motion, and without allowing the benefit of a conference between petitioner, counsel and defense witnesses, and without allowing petitioner's counsel to explain to the court what his plan or arrangement, for conducting the defense, was?

(c) Did the Supreme Court err, and thereby deny petitioner due process under Sec. 14 of the U. S. Constitution, and the equal protection of the laws under said section, in affirming these rulings of the trial court and in holding itself that there was no prejudicial error committed, and that the facts in the case, after eliminating the objectionable testimony, were sufficient to convict the defendant before any intelligent and honest jury; or did the opinion of the Supreme Court deny to him a trial by jury by substituting its own judgment for that of the jury, as provided by the Constitution of the United States and the State of

South Carolina, to be referred to more particularly hereinbelow?

IV.

The Result of the Irregularities of the Trial Court.

The Presiding Judge, according to the State Supreme Court, erred in admitting the testimony of the Sheriff, which the prosecuting attorney, the Sheriff himself, and the Presiding Judge thought competent as tending to show the guilt of the accused. That court said that the Presiding Judge erred for two reasons. There is still another reason why he erred, as we will show later. The testimony was corroborative of that of Henrietta Henderson and gave the bankground of the Sheriff's official approval of the charge she made against him in the presence of the Sheriff and the other officers, and tended generally to bolster up her claim. This testimony was exclusively for the jury, and the Presiding Judge could take no part in weighing it, either for or against the accused. But the Sheriff thought it was against the accused. The prosecuting attorney thought it was against him, and the Presiding Judge let the testimony in because he thought it was relevant. During the same day, and just five minutes before six P. M., the Presiding Judge ordered the defendant to take the stand, and he testified for an hour and continued into the next day with his testimony. An examination of the manner of cross-examination by the Solicitor will demonstrate that the Solicitor was not only endeavoring to elicit truth from accused; but was making specific charges against him, of insincerity, equivocation, deceptive tactics and even crime itself, holding him up to the ridicule of the trial jury and the audience. A reading of the cross-examination, beginning at f. 446, will show that the accused was charged with providing a cot for immoral uses of himself; that the accused went to the girl's house more than once, though he said he did not (f. 452); that she

called him more than once, though he said she did not (f. 456); that the accused was derelict in not telling her father as she had been sleeping in "your bed" (f. 459); that he had been to Charlotte, and that he had been to Augusta and stopped at a tourist camp (ff. 459-460), and that he had gone under the "pretense" of having some records adjusted, or something fixed; that he had always made it a point to go to her home when her father was away (f. 460); that he was not satisfied with damning her, causing her death, and now wanted to damn her character (f. 463); that he is willing to go to that extent in order to save his own hide; that he had gone to the extent of doctoring his own records since yesterday. You have gone and fixed up this receipt book (f. 467); that Henrietta Henderson had told him face to face in the jail that he sat on the couch while she carried the girl into the room (f. 484).

> "Q. You asked her a question; they were right when they swore that—did you not ask her, 'taking for granted it is true'" (R. 485).
>
> "Q. What question did you ask her?
>
> "A. I asked her 'To you and your God, you have never saw me before.'
>
> "Q. What you doing calling in God on that?
>
> "A. I knew I had not been there.
>
> "Q. You heard the Sheriff testify, and you heard the woman testify that you said, I did not give you any money, did I? The girl, the woman said, give me $10.00 and told me you give it to her and promised me $5.00 more.—you asked her the question.
>
> "A. She was under pressure" (R. 487).

At this juncture counsel for the accused asked the court to let him finish his answer, to which the court said counsel had the right to re-direct him after the Solicitor got through, saying if he was cut off Mr. Brown could put him on (R. 489).

"Q. How did you feel when you shook hands with Mrs. Henderson?

"A. I did not shake hands with her" (R. 495).

The purpose of this question could not have been for anything but to discredit the defendant for having shaken hands with his co-defendant, a negro woman.

Then again: "Q. Mrs. Salem was carried to the hospital on the day you were aiding and abetting in this abortion?

"Q. * * * You are willing to swear to anything to get out of the trouble you are in; there were three of you on the ambulance when you went over there and got her—why did you not leave one of them at the mortuary and go to the hospital? (R. 511).

"Q. You said he said he was going to kill you?

"The Court: I think he has taken time to answer.

"Mr. Brown: He is trying his best to answer; and the Solicitor is preventing him, asking another question in the midst of his answer" (R. 515).

Then after the accused had stated to the Solicitor that he was an educated man and the accused was not, and the Solicitor had stated to him that being uneducated did not keep him from telling the truth, and the accused stated that on cross-examination he could not answer as fast as if he was educated, the Solicitor asked him:

"Q. Do you want to rest awhile? (R. 519)

"Q. Your idea of getting the truth was sending her to your lawyer and getting her to change her story—June 23rd was the day they watched you like a hawk (R. 520).

"Q. We catch you in something and then you squirm into something else (R. 527).

"Q. Again, you are willing to swear anything to get out, are you not? (R. 530)

"Q. Why did you swear to something that was false? (R. 537)

"Q. * * * why did you put that over on this Court in order to get bond—just exactly the way you were getting these poor ignorant negroes to change their statements" (R. 539).

Again Mr. Galloway interrupted to say to the Court that the Solicitor is making a statement, to which the Court replied: "I think it was a question: Looking right at him." Again the Solicitor said:

"Q. Why did you put that over on this Court, just exactly the way you were getting these poor ignorant negroes to change their statements, wasn't it? (R. 540)

"Q. On the 22nd of June, the day before you laid this plan, Mrs. Dixon met her," etc. (R. 547).

V.

Reasons for the Allowance of the Writ.

The irregularities in the trial of petitioner clearly denied him a fair and impartial trial. The testimony of Sheriff Henry was so interwoven with that of Henrietta Henderson and the prosecuting attorney, in cross-examining the defendant, used the testimony of Henrietta Henderson, corroborated by Sheriff Henry, to argue and contradict the defendant with. The two were so interwoven that when the Judge admitted it, it became impossible for the jury to separate what Sheriff Henry had sworn from what Henrietta Henderson had sworn; but since the Sheriff and his officers furnished a background for Henrietta Henderson's testimony, it had the effect of strengthening hers, and when the witnesses for the accused in any way contradicted the testimony of Henrietta Henderson, it had the effect of contradicting the testimony of Sheriff Henry, for the Judge had allowed it for the consideration of the jury. The Supreme Court said this testimony was not proper; but the State Supreme Court reasoned that since Sheriff Henry was the ninth witness to be placed on the stand, inferen-

tially, the strength of it was ninth from the testimony of Henrietta Henderson. Whether it was the eighth or ninth witness, or possessed eighth or ninth degree strength, it was some testimony that the jury were bound, under their oaths, to consider, after the judge had allowed it to come before them. When the Supreme Court of the State decided this question of fact, it went outside of its bounds as declared by the constitution and statute law passed in pursuance thereof.

The record demonstrates beyond question that the presiding judge did not allow the defendant's counsel to state his position, and the record further shows that the defendant's counsel never one time suggested putting up the defendant as a witness; but that the presiding judge himself, suggested the defendant as a witness and directed that he be put up. And the following day the Solicitor cross-examined him, as outlined hereinabove, on the testimony that he had given, making as many charges against him, it is respectfully submitted, as he asked him questions. Some of them accusing him of the crime with which he was charged, others with procuring witnesses to commit perjury; others with putting something over the court; others with swearing falsely to anything to save himself. When this went to the Supreme Court of the State, it was there decided that the presiding judge did not abuse his discretion in continuing the case or lengthening the session of that day. And notwithstanding the fact that the petition for re-hearing called the court's attention to the issues made, the court, without any further discussion, passed a simple order to the effect that they had re-examined the case and that they had overlooked no questions of law or fact, and allowed the conviction to stand. This, we submit, is taking the liberty of the petitioner in violation of due process and without giving him the equal protection of the law.

Petitioner feels that he was denied his day in court, as is shown by the cumulative effect of the irregularities and errors of law herein presented, and that he did not receive the fair and impartial trial guaranteed him under the rules of the court, the Constitution of 1895 of the State, and the Statute Laws of the State passed in pursuance thereof. Nor did he get such trial as was guaranteed him under the provisions of the Federal Constitution, and the decisions of the Supreme Court of the United States. But that he was denied due process as is guaranteed him under the Fourteenth Amendment to the Federal Constitution. The particular sections and rules invoked are referred to herein specifically. When the Supreme Court of the State eliminated the testimony of Sheriff Henry, which undoubtedly bolstered up the testimony of Henrietta Henderson, the self-confessed perpetrator of the crime, it is respectfully submitted that it denied due process when it adjudged the defendant guilty on the other testimony remaining in the record, the Supreme Court of the State not being permitted under the Constitution or the Statute Law to decide questions of fact, and when the record abounds with testimony of witnesses in Spartanburg and in Greenville, South Carolina, substantiating in detail the claim of the defendant that he was elsewhere than at Henrietta Henderson's house on the day it is alleged the crime was committed. Nearly every witness for the defense, including some highly reputable citizens of Greenville, testified that petitioner was going about his usual business during the entire time it was claimed he made visits to Henrietta Henderson's house. And under our setup of Government, the appellate court being concerned entirely with errors of law, and the right of trial by jury being inviolate, the Supreme Court of the State could not adjudge your petitioner guilty upon the facts it had before it, nor could the Supreme Court of the State, under the present setup, decide that the improp-

erly admitted testimony of Sheriff Henry, and the testimony petitioner was compelled to give by order of the Judge, did not influence the jury on the trial at which he was convicted. The working of the rule one way would necessarily involve its working the other way. If the appellate court can reason that the jury did not convict upon testimony that the prosecuting officer did not rely upon, or testimony of a witness that was ninth from the beginning of the State's case, and thereby hold that other testimony relied upon by the State was sufficient to convict, although the objectionable testimony violated at least three rules laid down by the Supreme Court, it would be entirely impossible to tell where the trial Judge's province ended, and where the jury's province began. How can the Supreme Court tell that another jury, with Sheriff Henry's testimony eliminated, and with the defendant free to take the stand if he chooses, and when he chooses, during the trial of his case, would not be inclined to believe the testimony of the alibi witnesses, including those at Greenville, in another County Seat town several miles from Spartanburg?

The very purpose of a jury trial is to enable the jurors to pass upon the demeanor of the witnesses, including their manner of answering questions. It was never intended that a trial court should take the liberty of a citizen and convict him of an odious offense, a felony, on a written statement, such as the record contained before the Supreme Court in this case; and to do so is to violate the orderly procedure in criminal cases, since this is not a case of a total absence of testimony; but is a case in which a number of witnesses violently contradict one another as to the presence of the defendant at the place of the alleged crime. The cases cited in the record show that the Supreme Court of South Carolina has heretofore held prejudicial the admission of such testimony, and would not even hear argument as to whether it was prejudicial or not.

There is another reason why Sheriff Henry's testimony cannot be treated as uninfluential in this case. We must assume that the County's chief law enforcing officer, when enacting a scene such as he prearranged in the jail for the meeting of Henrietta Henderson and Evans, was endeavoring to get evidence with which to convict; that when he brings this testimony to the courthouse and offers it for the State, and as a State's witness, he thinks it has some influential quality worthy of the time consumed in gathering and presenting it. The Solicitor, when he presents his testimony to the jury for the State, must be indulged in the same presumption. And when defense counsel vigorously objected to such testimony, calling the trial judge's attention to its inadmissibility, and the trial judge overrules that objection, and admits it for the consideration of the jury upon the question of guilt or innocence of the accused, it must be presumed that the trial judge thought it had some bearing on that question. Do we then infer that the jury, after this fight in court for the admission of the testimony, did not consider it in passing upon the testimony, because perchance he was the ninth witness? What drama is it that ends quietly and with the last least, or vice versa?

We submit that such proceeding on the part of the Supreme Court of the State is, as we claimed in our petition for rehearing, a denial of due process to this petitioner, for it is undoubtedly, as cited by the authorities herein, not the regular time honored procedure sanctioned by the Constitution, Statutory Law, and the opinions of the Supreme Court heretofore rendered.

Many of the charges made by the Solicitor, during the cross-examination of the defendant, were based upon the hearsay testimony given by Sheriff Henry, and upon the testimony of the defendant given by him when the judge ordered him to take the stand. We feel that the sheriff's testimony and what the defendant was compelled to give,

and used against him by the Solicitor on cross-examination and otherwise, were so interwoven with the testimony of Henrietta Henderson that it not only gave it a sanctioning official background; but made the sheriff's testimony and that of Henrietta Henderson, together with the charges made by the Solicitor in his cross-examination, so interwoven as to make it impossible for the jury to separate one from the other. Hence, only another jury, without the presence of the Sheriff's testimony and without the defendant being compelled to testify, could give the defendant that orderly trial, which constitutes due process.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of South Carolina, commanding that court to certify and to send to this Court for its review and determination, on a day to be therein named, a full and complete transcript of the record and of proceedings herein; and that the Judgment of the Supreme Court of the State of South Carolina be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

July 12, 1943.

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